

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>THE TENNESSEE E-RATE</b>	)	<b>CC Docket No. 02-6</b>
<b>CONSORTIUM</b>	)	

**Request for Waiver**

The Tennessee E-rate Consortium (Tennessee) respectfully requests the Federal Communications Commission review and waive its competitive bidding requirements as determined by the fund administrator, the Universal Service Administrative Company (USAC), related to multiple 2012-2013 Form 471 applications submitted by 43 members of the Tennessee Consortium. Generally, the Federal Communications Commission's (FCC or Commission) rules may be waived if good cause is shown. 47 C.F.R. §1.3. Further, the Commission may exercise its discretion to waive a rule where particular facts make strict compliance inconsistent with public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). Waiver of the Commission's rules is appropriate only if both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest. *NetworkIP, LLC v. FCC*, 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular*, 897 F.2d at 1166. A waiver of the rules is appropriate in this case because the facts present a special circumstance and public interest will be served by the Commission's actions. The Tennessee Consortium respectfully requests the Commission to waive certain competitive bidding regulations based on just cause and direct the applications to USAC for full review and consideration on their merits.

## **Background**

The Tennessee E-rate Consortium is a consortium of school districts located across the state of Tennessee, with Metro-Nashville Public Schools serving as the consortium lead. Participation in the Tennessee Consortium is voluntary and exists for the purpose of procuring Telecommunications Services, Telecommunications and Internet Access Services. At the inception of the consortium in 2011, 79 school districts joined by executing a Letter of Authorization.

Under the Schools and Libraries Universal Service Support Mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts on eligible telecommunications services, telecommunications, Internet access, internal connections, and basic maintenance of internal connections<sup>1</sup>. Therefore, under this regulatory authority, the Tennessee Consortium posted an FCC Form 470 on behalf of its member schools. Historically, the Tennessee Consortium obtains Letters of Agency (LOA) from each consortium member when the member joins the consortium. *See Exhibit One, Example of Member Letter of Agency.* Member districts are then responsible for posting their own FCC Forms 471 for services procured by the consortium's Form 470.

On February 4, 2011, the Consortium posted Form 470 534070000900066 and a Request for Proposal (RFP) in accordance with E-rate program rules<sup>2</sup>. Following the 28-day competitive bidding period, a five-year contract for services was awarded to ENA Services, LLC for Telecommunication Services, Telecommunications and Internet access services.

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<sup>1</sup> 47 C.F.R. §§ 54.502, 54.503

<sup>2</sup> 47 C.F.R. § 54.503

By the fall of 2011, 43 additional school districts in Tennessee sought to join the Tennessee Consortium and were considered as members. *See Exhibit 2, List of 43 Additional Consortium Members.*

Because of the addition of new consortium members and the need to make a determination whether such additions were acceptable for E-Rate purposes, the consortium lead noticed a slide during the Fall 2011 Annual USAC Training event that appeared to address this issue and used that training event as an opportunity to ask for clarification of a procedural issue that was noted on Slide 20 of the “Road to Success” presentation *See Exhibit 3 “2011 Fall training USAC Road to Success Slide 20 - LOA timing”*. Based on the information presented on that slide, the consortium lead asked the following question during training, ***“Could new consortium members post a Form 471 funding request based on an awarded multi-year contract even though the new consortium members were not originally listed on the Form 470 posted in February 2011?”*** USAC staff verbally confirmed during the training session – and in front of all training participants, including FCC staff members who were present at the training session - that this was procedurally acceptable. The consortium lead, having understood from this training and previous training information that the USAC presentation is reviewed by the FCC prior to presentation, believed that he was receiving guidance from USAC, which had been approved from the FCC.

Erring on the side of caution, the consortium lead followed up the E-rate training discussion with an e-mail to Catriona Ayer, USAC staff member, asking again:

**Consortium Lead (email dated 9/27/11) paraphrased:** *Since the rules state that the LOA must be signed prior to the posting of the form 471, which will be posted by the individual LEAs, can LEAs sign an LOA at this time for the purpose of posting a 471 for the 2012-2013 program year? The LEAs would cite the 470*

*that was posted for the consortium in February 2011, sign an LOA and a cooperative purchasing agreement, providing it to me as the lead of the consortium prior to filing their own form 471 for the 2012-2013 program year? Are there reasons this would not be within the rules?*

**Leslie Frelow (email response dated 9/30/11):** *I reviewed the LOA. It is permissible under E-rate rules to allow those other members to join the Tennessee E-rate Consortium. It is not uncommon for members to join or leave a consortium after the competitive bidding and vendor selection is completed. The new consortium members' LOAs must be signed and completed by the Form 471 certification postmark date.*

Even after receiving written confirmation from a Senior USAC staff member, on October 6, 2011, the consortium lead followed up once again asking about a specific School District scenario and once again, the written advice was that it was procedurally acceptable to add consortium members as long as the associated LOAs were executed in advance of the filing of the individual Forms 471. *See Exhibit 4, E-Mail Conversations Dated 9/27/11 and 9/30/11 and 10/6/11 (read from the bottom).* Based on this seemingly sound advice, consortium members – both existing and new - created funding requests for ENA Services, LLC service and posted Forms 471 for the E-rate funding year 2012-2013, therein referencing the 2011 establishing Form 470. In total, the 43 additional consortium members created funding requests for the ENA service on their Forms 471 totaling more than \$17,000,000 in discounts.

At the date of writing this Request for Waiver, 44 of the impacted consortium members' 90 total funding requests have been approved for funding. However, 41 additional funding requests have been denied and 5 additional funding requests are pending further review. In addition, eight of the previously approved districts have received COMAD letters related to the same issue. Those denied were denied on the basis of a competitive bidding violation because the member entity was not listed on the

original Form 470 posted in February 2011. This denial was in direct opposition to USAC's procedural guidance, as shown by the text of the emails in Exhibit 4.

### **Competitive Bidding**

Competitive bidding is a cornerstone of the E-rate program. In accordance with the Commission's competitive bidding rules, applicants must submit to USAC for posting to USAC's website an FCC Form 470, which describes an applicant's planned service requirements and information regarding the applicant's competitive bidding process.<sup>3</sup> The competitive bidding process must be fair and open, not compromised because of improper conduct by the applicant and/or service provider, and all potential bidders must have access to the same information and be treated the same throughout the bidding procurement process.<sup>4</sup>

This is the precise procedure the Tennessee Consortium followed. A Form 470 and detailed RFP were posted for Telecommunications Service, Telecommunications and Internet Access services and a service provider, ENA Services, LLC was selected in accordance with all local, State and FCC rules and regulations. Before the consortium proceeded in the following year with additional members, the consortium sought the procedural guidance of USAC on *three separate occasions* – and was assured *at all times*, once in front of FCC staff members and twice in writing from a senior member of USAC, that the procedure the consortium planned to follow was correct and in

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<sup>3</sup> 47 C.F.R. § 54.503, *see* Instructions for Completing the Schools and Libraries Universal Service Description of Services Requested and Certification Form, OMB 3060-0806 (April 2002) (FCC Form 470).

<sup>4</sup> *See, e.g., Schools and Libraries Universal Service Support Mechanism*, Third Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 02-6, 18 FCC Rcd 26912, 26939, para. 66 (stating that a fair and open competitive bidding process is critical to preventing waste, fraud, and abuse of program resources).

accordance with all E-rate rules and regulations. Because the FCC regulations on the consortium membership change were silent, the consortium believed USAC had the proper authority to provide guidance on proper procedure necessary for filing the 2012-2013 application. At no time did the consortium lead, nor apparently USAC, appear to understand that what was prompted as a procedural question ultimately would have required a policy change because the guidance was in conflict with FCC rules.

It is important to understand the context in which the Tennessee Consortium and associated procurement came to fruition. For several years prior to 2011/2012, there was another consortium contract in place in Tennessee (the Greeneville City Consortium or “Greeneville”) that served more than 88% of the Districts in the state (or approximately the total of the combined original 79 districts plus the incremental 43 that are the subject of this waiver request). The Greeneville contract did not expire until June 30, 2012. The consortium lead in this instance decided to post a Form 470 and release a detailed RFP well in advance of the expiration of the existing consortium contract in the event that a provider other than the incumbent provider was awarded. As we’re sure you are aware, transitioning network services on the scale contemplated in the RFP to a new provider covering potentially over 100 school systems would require a minimum of six months to a year of preparation and installation - much longer than the time available from the end of the filing window until the start of the next E-Rate year – which was approximately three months. For this reason, the consortium lead proceeded well in advance to allow as seamless a transition as possible, if necessary, with a clear expectation that many users of the new contract would begin such usage in the second year of the contract, when the Greeneville contract expired. The consortium model for procurement of these services

has been widely utilized in Tennessee since nearly the Program's inception and all interested parties were well aware that there was a **VERY HIGH** likelihood that all of the consortium members on the Greeneville contract would transition to the new contract upon its expiration.

### **Discussion**

There is absolutely no harm to the fund by allowing the consortium's actions or by waiving any rules inadvertently violated – USAC itself stated that consortium members may come and go during the course of a funding year. The funds requested by the 43 applicants are for Priority One services at a level reasonably consistent with amounts funded in previous years. Therefore, the fund clearly should have expected to provide funding to the 43 districts in the amounts requested for 2012-2013.

Additionally, no FCC regulation was knowingly violated by the consortium lead or the consortium members. To the contrary, the consortium lead tried numerous times with ever increasing detailed questions to get USAC to indicate that allowing new entrants to the consortium was ultimately not correct. However, despite those efforts, USAC continued to insist that adding consortium members was allowable and the consortium lead ultimately believed that he had performed the necessary investigation of the question and had the answer to move forward with adding the 43 new districts to the consortium without having to post a new Form 470.

The sole issue is the addition of the 43 new consortium members in the second year of the multi-year contract for services with ENA Services, LLC and whether approval of those applicants harmed the fund in some manner. There is no evidence available which suggests that had the additional 43 members been included on the Form

470, responding prices for service would have been any different. We reasonably contend that it is only subjective speculation that the inclusion of the additional members by way of the Form 470 list would have made an impact to the bid responses and unfortunately, at this stage, it is an issue that cannot be answered because USAC itself told the consortium there was no need to post a new Form 470 with the additional entities. Therefore, we must circle back to the discussion above about the hypothesis regarding the inherent assumption that the Tennessee E-Rate Consortium would ultimately be comprised of substantially the same number of members as the Greeneville City Consortium.

Using this logic, we respectfully contend that our own supposition presents an arguable defense that the pricing in the responses was reflective of the ultimate scope and breadth of the project (aside from the list of entities noted on the Form 470) and further supports our contention that there was no harm to the fund caused by the inclusion or exclusion of Tennessee school districts on the original 470 filing.

### **C.F.R.**

A careful review of the Code of Federal Regulations finds that the regulations do not address the issue of consortium membership change during multi-year contracts – the regulations only state that consortiums are allowed as eligible entities. Therefore, to allege that a competitive bidding violation has occurred without any specific regulatory basis for that allegation is perplexing, at best. FCC rules do not state that a consortium must post a new Form 470 any time that a consortium member joins or leaves a consortium. If that is the FCC's intent, we politely suggest that it be addressed through the federal rule-making process.



USAC's verbal and written guidance on the issue of whether new members could rely on the previously posted Form 470 has a very real impact at the applicant level. Because of USAC's presumably procedural guidance, 43 new consortium members posted a Form 471 and indicated their intent to buy services from the establishing consortium Form 470 and contract. In total, more than \$17 million worth of services were purchased based on USAC's assurance that the procedure the applicants proposed to follow was correct.

### **Conclusion**

Though USAC potentially erred in issuing their procedural guidance and consortium members potentially erred in following such guidance without further investigation of the issues with the FCC, we feel it is clear that the fund was not harmed by the actions taken based on the guidance. Additionally, strict adherence to this decision would not further the public interest and would in fact cause immeasurable and undue harm to the applicants affected by the unfortunate set of circumstances they are faced with. While we recognize the need for the FCC to enforce its rules even in the event of unintentional guidance by USAC or unintentional misinterpretation of that guidance by an applicant, we believe allowing a waiver regarding this highly complex and perhaps unclear set of issues/procedures/rules, where the applicants have clearly demonstrated repeated efforts to remain compliant with the rules, is in the public interest, supports the FCC's goals of not harshly punishing applicants for these type errors, does not set an inappropriate precedent and it does not harm the fund monetarily. Furthermore, this waiver request relates to interpretation or misinterpretation of issues/procedures /rules and does not present any allegations of waste, fraud or abuse.

Therefore, we request that the Commission waive the applicable sections of 47 C.F.R. §§ 54.502, 54.503 in accordance with their discretion to waive such rules based on the facts presented which clearly represent an extraordinary set of circumstances demonstrating that strict compliance would be inconsistent with the public's interest. Please see *Exhibit 5 BENs and Applications affected* for the full list of currently identified impacted applicants requiring waiver of these rules. In addition, we request that any applicant in Tennessee not yet identified as having been found non-compliant related to this specific issue on any Form 471 or attachment to this request for waiver are eligible to reference this waiver should it be granted. We further request that this waiver apply to any COMAD action that has been or will be started related to impacted applicants who were initially funded but have now had or will have funding denied.

Most Sincerely,

/s/ Kimberly Friends

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